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Nos. 82-585 and 82-586

IN THE

Supreme Court of the United States

October Term, 1982

ALOHA AIRLINES, INC.,
Appellant,
against
DIRECTOR OF TAXATION, STATE OF HAWAII.

HAWAIIAN AIRLINES, INC.,
Appellant,
against
DIRECTOR OF TAXATION, STATE OF HAWAII.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

Brief on Behalf of the State of New York as *Amicus Curiae*

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OCTOBER TERM, 1982.

ALOHA AIRLINES, Inc.,

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DIRECTOR OF TAXATION, STATE OF HAWAII.

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Brief on Behalf of the State of New York as *Amicus Curiae.*

Interest of *Amicus Curiae.*

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. challenge the right of Hawaii to impose a tax on airlines measured by gross income. The Hawaii tax was treated as a property tax by the Tax Appeal Court of the State of Hawaii. Its decision was affirmed by the Supreme Court of that State. The airlines claim that the tax violates the Supremacy and Commerce Clauses of the United States Constitution, alleging that the tax is proscribed by section 1113 of the Federal Aviation Act, 49 USC § 1513, enacted in 1973. In so doing, they have relied on New York lower court decisions holding that New York's franchise tax* on transportation and transmission companies, including aviation corporations since 1935,** measured by allocated gross earnings was preempted. The State's appeal to the New York Court of Appeals will be heard by that Court in early June.

While the Hawaii property tax*** and New York's longstanding franchise tax are, of course, different, the Court's opinion here could well have an affect on the validity of the New York franchise tax, a major revenue source.

Statutes Involved.

49 USC, § 1513, as amended by section 532 of the Airport and Airway Improvement Act of 1982,**** Pub L No 97-248, 96 Stat 701 provides in pertinent part:

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*These tax provisions are contained in section 184 of the New York Tax Law and are set forth in the Addendum to this brief.

**New York has imposed a franchise tax on transportation and transmission corporations measured by gross earnings since 1896 (ch 908, L 1896).

***We do not address the issue of whether the Hawaii tax is a property tax.

****This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub L No 97-248, 96 Stat 324.

"(a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * *

"(b) Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *."

Section 239-6 of the Hawaii Rev Stat (replacing 1976) provides in pertinent part:

"*Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students * * * the tax shall be three per cent * * *. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [comprising the General Excise Tax law of Hawaii] but is not in lieu of any other tax."

ARGUMENT.

State property, net income, franchise taxes measured by gross receipts are not preempted by Section 1113 of the Federal Aviation Act.

Simply reading subsections (a) and (b) of section 1113 of the Federal Aviation Act demonstrates a superficial ambiguity in the statute in that it permits States to levy property and franchise taxes while barring indirect taxes on the gross receipts. However, the statute was not enacted in 1973 on a clean slate. It was written against a background of decisional law and state tax statutes, a background disregarded by appellants and the Solicitor General. When the statute is examined in that historical context and its legislative history, the congessional intent becomes clear. As we will show, Congress did not intend to prohibit States from imposing property and franchise taxes measured by gross receipts on airlines and that conclusion is fully consistent with the statute's language, properly construed.

A. It had been well settled when section 1113 of the Aviation Act was enacted in 1973 that including gross receipts as items that could be used as a measure for property and franchise taxes did not make them taxes on gross receipts.

At the time that section 1113 of the Federal Aviation Act was enacted in 1973, it was well established that States could use gross receipts as the *measure* of an otherwise constitutional tax, even though a tax imposed directly or indirectly on gross receipts might otherwise be invalid. See, Tribe, *Constitutional Law,* p 365.

Historically property and franchise taxes based on gross receipts have been viewed as taxes on the property, or a

local privilege or franchise, the value of which is measured by receipts. Thus, such property taxes have been sustained (*Great Northern Railway Co. v Minnesota,* 278 US 503 [1929]). In *Pullman v Richardson,* 261 US 330, 338 339 (1923), the Court said:

> "[A] State may elect and employ any appropriate means of reaching its actual or full value as part of a going concern,—such as treating the gross receipts from its use in both intrastate and interstate commerce as an index or measure of its value,—and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce."

Similarly, gross receipts or gross earnings have simply constituted a "fair means of measuring a local privilege or franchise". *Western Livestock v Bureau of Revenue,* 303 US 250, 256, 257 (1938); see, also, *Railway Express Agency v Virginia,* 358 US 434, 441 (1959). The cases also establish that a tax imposed on the privilege of exercising a corporate franchise measured by gross earnings, income or capital is neither a direct nor an indirect tax on gross earnings, income or capital of a corporation. It follows that a tax measured by gross income is not a direct or an indirect tax on gross income.

A tax on gross receipts has long been viewed as distinct from taxes measured by the gross earnings or receipts of a corporation and is also not an *indirect* tax on gross receipts included in the yardstick. See *Werner Machine Co. v Director of Taxation,* 350 US 492 (1956). That case

involved the validity of a New Jersey franchise tax measured by a corporation's net worth. The taxpayer's net worth included obligations of the Federal government which are immune from state taxation under the provisions of 31 USC 742. The Federal statute provided at that time:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

This Court pointed out that this rule embraced "indirect taxation of such obligations through their inclusion in a tax imposed on all property of a taxpayer". But the Court in holding the franchise tax valid, said (350 US at p 494):

> "This Court has consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. See, *e.g.*, *Society for Savings v. Coite,* 6 Wall. 594; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Home Ins. Co. v. New York, supra; Educational Films Corp. v. Ward, supra; Pacific Co. v. Johnson, supra.* We have only recently adhered to this principle in another aspect of this field of taxation. See *Society for Savings v. Bowers, supra,* at 147-148. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals,* 338 U. S. 665, on which appellant relies, is distinguishable, in that it did not involve a franchise tax, but rather a tax whose legal incidence this Court found to be upon the intangible assets of the corporation.

> "Since as applied here this is a permissible tax on the corporate franchise, the decision below must be *Affirmed.*"

In *People v. Home Insurance Company,* 92 NY 328 (1883), affd 134 US 594 (1890), a franchise tax case, the measurement of the tax included interest on United States bonds and the amount invested in United States bonds. The New York Court stated the issue as follows (*id,* at 338-339):

> "It thus appears that the only question presented for our consideration under this branch of the appeal is whether the tax in question was in fact levied upon the franchises of the defendant, which would be undeniably lawful, or upon the property of the corporation invested in the securities of the general government, which would be unlawful. It is not claimed that the law in terms assumes to authorize the taxation of the exempted securities, but *it is asserted that it effects this result indirectly, and, therefore, amounts to the exercise of a prohibited power.*" (Emphasis supplied.)

The Court, in upholding the tax, said (*id,* at 343):

> "Applying the tests derived from these authorities it seems conclusively established that the act under which this tax was levied must be held to have imposed a franchise and not a property tax, and that its enactment constituted a lawful exercise of legislative power * * * The income of these corporations is referred to only as a means of arriving at the measure of their liability. As was said in the *Provident Institution Case:* 'The subject matter to

> be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis of computing the amount.' * * * We feel constrained to hold that the tax in question was a tax on franchises alone, and was, therefore, within the exercise of legitimate legislative power."

In affirming, this Court in *Home Insurance Company v. New York,* 134 US 594, 600 (1890), said:

> "By the term 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity * * * The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. *No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows* * * * " (Emphasis supplied.)

B. The legislative history of section 1113 of the Federal Aviation Act show no intent to exclude States' property and franchise taxes using gross receipts as a measure from the taxes expressly permitted under section 1113.

Contrary to the claims of appellants and the Solicitor General, there is absolutely no basis for a conclusion that property, net income, and franchise taxes were not within the taxes expressly protected by section 1113(b) of the Federal Aviation Act. As discussed above, it had long

been held that using gross receipts as a measure for taxes did not mean such a tax was a tax on gross receipts, either directly or indirectly. Nothing in the Aviation Act's legislative history shows that Congress intended to ignore such interpretations. Accordingly, the restriction on direct or indirect taxes on gross receipts in section 1113(a) is simply not applicable to property, net income, or franchise taxes.

1. An intent to preempt state taxes must be clearly shown by Congress.

When Congress speaks to proscribe the incidents on which state taxes may be imposed, it does so clearly and precisely. See, for example, the discussion in the annotation of 12 USCA 548, state taxation of national banks prior to 1973. The complete absence of any reference in the Congressional history of section 113 of the Federal Aviation Act, as we discuss below, to broad-based property, net income, and corporate franchise taxes, such as the tax which was then being imposed by the State of New York, supports the view that Congress had not the remotest intent of including them within the state tax proscription Congress set up in subsection (a) of the Federal Act. To the contrary, Congress, in subsection (b), carefully preserved state property, income and franchise taxes. Congress, in the past, has spoken with clarity when it desired to proscribe a particular type of taxation. These are the very considerations discussed by this Court in *Sullivan v United States,* 395 US 169 (1969). There the issue before the Court was whether Connecticut's sales and compensating use taxes were prohibited on sales to or uses by servicemen as a result of section 514 of the

Soldiers' and Sailors' Civil Relief Act. This Court observed, in holding that Congress never intended to bar state sales and use taxes, that (395 US at 178):

> "The absence of any reference to sales and use taxes in the history of § 514 is particularly illuminative of legislative intent when considered in the light of Congress' full awareness of such state taxes and their relationship to federal interests. Sales and use taxes were prevalent by 1942, and congress had dealt specifically with them only two years earlier. In the 1940 Buck Act, Congress provided that the States have 'full jurisdiction and power to levy and collect' sales and use taxes in 'any Federal area,' except with respect to the sale or use of property sold by the United States or its instrumentalities through commissaries, ship's stores, and the like. If nothing else, this statute illustrates that Congress in 1942 was fully cognizant of state sales and uses taxes and identified them by name when it wanted to deal with them."

Here, if Congress wished to prohibit taxes other than those "on the gross receipts" from the sale of air transportation, it could have said so clearly as it has done with other prohibitions of state taxes. Instead, it expressly protected property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services without restriction.

Moreover, the power to tax is an attribute of state sovereignty and is one of the functions essential to independent state existence. In fact, a State's taxing powers is not conferred by the Federal Constitution but exists independently of it. *People ex rel. Hatch v Reardon,* 184 NY

431 (1906), affd 204 US 152 (1907). Thus, it has long been recognized that "historic * * * powers of the States [are] not to be superseded" by Federal law, "unless that was the clear and manifest purpose of Congress". *Rice v Santa Fee Elevator Corp.*, 331 US 218, 230 (1974); accord, e.g., *Ray v Atlantic Richfield Co.*, 435 US 151, 157 (1978).

It is clear, we submit, that Congress did not intend to preempt state taxes measured by gross receipts by subsection (a) of section 1113 of the Federal Aviation Act. In addition, the entire statute demonstrates that Congress reaffirmed the rights of States to have airlines pay for the privileges, protection and services which they and their property receive.

2. *The legislative history of section 1113 of the Federal Aviation Act shows no intent to preempt States from applying broad-based property and franchise taxes to airlines.*

Section 1113 of the Federal Aviation Act was enacted in response to the *Evansville-Vanderburgh Airport* case, 405 US 707, 721, 722 (1972). In that case, the Court upheld the validity of a city-imposed "use and service charge" of $1.00 on each enplaning commercial passenger at Evansville, Indiana, which was collected from the passenger, and a New Hampshire State Law levying a $1.00 charge on the airline for each passenger on large commercial airlines, and 50 cents for each passenger on smaller planes. The Court ruled that States and cities could constitutionally impose a reasonable charge on interstate and intrastate air passengers where there was no Federal statute or specific congressional action evidenced a purpose to preempt state power.

The statements by the prime sponsors* when the bills were introduced, statements in the committee reports, and statements by managers and others on the floor of both houses confirmed that the prime impetus for the prohibitory language was to ban the proliferating head taxes and similar taxes directed against airlines.** This is further borne out by the 1982 amendment to the law, section 532 of the Airport and Aviation Improvement Act of

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*Though the Act was not enacted until 1973, an earlier version was passed by both Houses of Congress in 1972, but was pocket vetoed by President Nixon. See, 118 Cong Rec 35862 (Oct. 13, 1972) (Senate passage of Conference Report); *id.* at 35116 (Oct. 11, 1972) (House passage); *id.* at 37203 (announcement of pocket veto).

Senator Magnuson was one of the two prime sponsors in the Senate, see *id.* at 22598. Representative Adams sponsored legislation in the House and conducted most of the hearings on the various proposals. See, hearings on HR 2337, 14847, and 10326 (and identical bills) before the Subcommittee on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 92nd Cong, 1st Sess (1972).

The relevant legislative history of the Act spans two sessions of Congress.

**The Senate Commerce Committee stated in its report on the bill:

> "S.38 contains a prohibition on state taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax."

S. Rep. 12, 93rd Cong., 1st sess. 11-12 (1973).

See, e.g., H. Rep. 1279, 92nd Cong., 2d sess. 2, 4 (1972); S. Rep. 1005, 92nd Cong., 2d sess. 20-25 (1972); S. Rep. 12, 93rd Cong., 1st sess. 4, 12, 17 (1973), H. Rep. 157, 93rd Cong., 1st sess. 2-3, 10 (1973); 118 Cong. Rec. 22599 (June 27, 1972) (remarks of Sen. Cannon), *id.* at 27815 (Aug. 10, 1972) (remarks of Sen. Cannon), *id.* at 27816 (remarks of Sen. Cotton), *id.* at 27826-27 (remarks of Sen. Hartke), *id.* at 27828 (remarks of Sen. Spong), *id.* at 29153 (Aug. 15, 1972) (remarks of Rep. Staggers); 119 Cong. Rec. 214 (Jan. 4, 1973)

(Continued on following page)

1982. At the same time, Congress intended to reconfirm to the States major sources of revenue.***

The clearest congressional statement of the intent and scope of section 1113 of the Federal Aviation Act is found in Senate Report 93-12. In its discussion of the state tax prohibition, the Report states:

> "[The bill prohibits] a new, inequitable and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburg Airport Authority District,*

(Footnote continued)

(remarks of Sen. Cannon), *id.*, at 3928 (Feb. 8, 1973) (remarks of Rep. Adams), *id.* at 13898 (May 2, 1973) (remarks of Rep. Staggers), *id.* at 13899 (remarks of Rep. Kuykendell), *id.* at 13900 (remarks of Rep. Jarman), *id.* at 13905 (remarks of Rep. Adams).

***The senior staff counsel for the Ways and Means Oversight Subcommittee of the United States House of Representatives wrote:

> "The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or 'other charges' with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce."

Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States,* 28 Cath UL Rev 227, 246 (1979).

> *et al. v. Delta Airlines, Inc., et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for 'aviation-related purposes'. While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adquate safeguards to prevent undue or discriminatory taxation." (US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1446)

Throughout the report, the type of tax primarily discussed is a passenger head tax, whether paid directly by the passenger or absorbed by the carrier. The tax is described in the report as a flat rate on passengers, regardless of the distance traveled by the passenger.

In regard to subsection (b) of section 1113, which makes clear other state taxes are not prohibited, the Conference Report states:

> "The Senate bill also provided that *the prohibition would not extend to* the levy or collection of *other taxes, such as property taxes,* net income taxes, *franchise taxes,* and sales taxes, and sales or use taxes, nor to the levy or collection of other charges such as reasonable rental charges, landing fees, and other services charges from aircraft operators for the use of airport facilities." (Conference Report No. 93-225, found in US Code Congressional and Admin News, 93rd Cong, 1st Session, Vol 1, p 1458) (Emphasis added.)

The legislative history of the Federal Act found in the Subcommittee Hearings and Reports is replete with discussions of the limited scope of the state tax prohibition intended by Congress (Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Ninety-Second Congress, 2nd Session, on HR 2337, HR 14847 and HR 10326, Serial No. 92-74 [hereinafter referred to as "Subcommittee hearings, Ninety-Second Congress"] and Ninety-Third Congress, 1st Session, on HR 4082, *et al.*, Serial No. 93-6 [hereinafter referred to as "Subcommittee hearings, Ninety-Third Congress"]).

In the hearings there is limited discussion of a unique Ohio Airlines excise tax. The concern of the Subcommittee and of the industry witnesses was the proliferation of discriminatory, selective state taxes in the form of the *Evansville* type of taxation or the Ohio Airlines excise tax.

The Ohio excise tax on airlines read as follows:

> "Section 5745.02. *Tax imposed on transporting by air.*—For the purpose of providing revenue for the use of the general revenue fund of the state * * * an excise tax is hereby imposed upon the privilege of engaging in the business of transporting persons, or property by air within this state." (Emphasis supplied.)

The measure of the Ohio tax was four (4) percent of the receipts derived from or attributable to business carried on within Ohio.

Theodore Koetz, then Ohio Deputy Tax Commissioner, testified before the Congressional subcommittee on considering the Federal Aviation Act stated:

> "We have an airlines excise tax in Ohio which is unique, and we are probably the only state in the 50 states that has such a tax. (p. 246 of Subcommittee Hearings, Ninety-Third Congress).
>
> "The Ohio tax structure may be unique in reference to airlines. Most businesses in Ohio, be they domestic or foreign, intrastate or multistate, are amenable to a *franchise tax* and a personal property tax * * * However, the airlines are fully subject only to the corporate franchise tax. [And a less burdensome property tax and the airlines excise tax.]" (Emphasis added, p 247.)

The Ohio Supreme Court when examining the Ohio airlines excise tax had clearly distinguished the Ohio franchise tax (which as applied to airlines may include receipts from the sale of air transportation in the calculation of its base) from the Ohio Airlines excess tax as follows in *United Airlines v Porterfield,* 276 NE2d 629, 635 (1971), app dsmd 401 US 917 (1972):

> "R.C. 5733.01, Ohio's corporation franchise tax statute, provides, in pertinent part:
>
> '* * * the tax * * * for foreign corporations shall be [1] for the privilege of doing business in this state, [2] owning or using a part or all of its capital or property in this state, or [3] holding a certificate of compliance with the laws of this state authorizing it to do business in this state during the calendar year in which such fee is payable.'
>
> "United is subject to the tax provided for by that statute, measured, in part, by the amount of the

> receipts from airline passenger tickets issued in Ohio for both intrastate and interstate flights. See *American Airlines v. Porterfield* (1970), 21 Ohio St. 2d 272.
>
> "We mention the franchise tax to clearly reveal that we are mindful that *the tax in issue in the instant case is not another franchise tax on the right to do business in Ohio* in the corporate form of organization, and that the airline tax is not levied in lieu of other state taxes." (Emphasis supplied.)

Mr. Tipton, the Chairman of the Air Transportation Association of America, Inc., described the Ohio tax in his testimony at the Transportation and Aeronautics Subcommittee Hearings on section 1113 (Ninety-third Congress, First Session) at page 98, as follows:

> "Particularly dangerous, burdensome, and discriminatory in our judgment is one state's imposition of a tax on the gross receipts derived from *the sale of interstate air transportation—a so-called airlines excise tax.* This tax is levied at a rate of 4 percent on airline receipts in that state 'for the privilege of engaging in the business of transporting persons or property by air.' "

He did not voice any objection to taxes measured by gross receipts. The state tax prohibition of subsection [a] initially considered by the Ninety-Second Congress contained the prohibition of a state or local tax on: [1] "persons traveling in air commerce" and [2] "the carriage of persons in air transportation" (HR 14847, p 2, lines 18-22; HR 2337; p 1, lines 6-9). The legislative history indicates that the language "on the sale of air transportation or on the gross receipts derived therefrom" added to the final

text of section 1113 was directed specifically at Ohio's airlines excise tax. With the addition of this language, subsection (b) was added to assure and reaffirm state taxing power. It circumscribed the taxes prohibited by subsection (a).*

In addition to New York whose franchise tax on transportation companies engaged in aviation dates *back to 1935,*** Maryland has had a franchise tax on transportation companies which is imposed on airlines. It, too, was in effect in 1973. The tax is measured by gross receipts (Annot Code of Maryland, Art 81, §§ 129, 130).

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*In November, 1973, the State of Ohio, *sua sponte,* in an opinion by its Attorney General, declared that Ohio's airline excise tax "must be discontinued because it conflicts with section 1113 of the Federal Aviation Act." The opinion is not expansive and did not elaborate on the reasoning which led to the legal conclusion. It is, however, consistent with both the language and history of the Aviation Act, as we have discussed.

**49 USC 1301 defines "air commerce" and "air transportation". The definitions are applicable to those terms as used by section 1113 of the Federal Aviation Act. The definitions are as follows:

> "(4) 'Air Commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> • • •
>
> "(10) 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

(Continued on following page)

One of the major taxes of the State of Washington, which does not have an income tax, has for many years been its public utilities tax which is imposed on corporations, including airline corporations. It is imposed on the "act or privilege of engaging * * * in * * * business." The tax is measured by gross income. The tax, prior to 1973, had been construed to be a franchise tax. *Public Utility District No. 3 of Mason County v State,* 427 P2d 713, 715 (Wash, 1967). Interestingly, one of the sponsors of Senate Bill 3755, 92d Cong, which included section 1113 of the Federal Aviation Act as enacted, was Senator Magnuson of the State of Washington. Representative Adams, also from the State of Washington, sponsored the legislation in the House. It is doubtful that they intended to preempt Washington's nondiscriminatory tax on airlines and other utilities and carriers.*

It is also significant that Congress has been mindful of the long-established difference between taxes and their measurement. Thus, when it amended 31 USC § 742 in

(Footnote continued)

It appears that if Congress had intended to preempt the levy of New York's section 184 franchise tax, the preemption, because of the broad definition of "air commerce", would extend to gross earnings from the sale of air transportation of persons, regardless of whether it is intrastate, interstate, overseas, or foreign. Thus, if the New York tax now violates section 1113, it would have violated section 1113 from January 1, 1974, even before the enactment of chapter 486 of the Laws of 1981 which amended the New York tax to include gross receipts from interstate transportation in its measurement base. Airlines in New York paid the tax measured by their gross intrastate earnings until the 1981 amendment of section 184 without raising an objection that the tax was preempted by the Federal law. No objection was voiced to the New York tax or other State franchise taxes in the Congressional hearings.

*The Committee on Transportation and Aeronautics included Congressman Bertram L. Podell of New York. The Committee on Interstate and Foreign Commerce included Congressmen Bertram L. Podell, James F. Hastings and Norman F. Lent of New York and Goodloe E. Byron of Maryland. These Committees held the hearings on section 1113 of the Federal Aviation Act.

1959, which prohibits state taxes on Federal obligations, it preserved non-discriminatory franchise taxes. That section now provides:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. *This exemption extends to every form of taxation* that would require *that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax,* except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." (Emphasis supplied.)

The purpose behind that amendment is stated in the Bill's legislative history, 59 US Code Cong & Admin News, pp 2773-2774, as follows:

> "D. CLARIFYING EXEMPTION OF U. S. OBLIGATIONS FROM STATE OR LOCAL TAXATION
>
> "Present law provides that obligations of the United States are to be exempt from taxation by or under State or local authority. The Supreme Court has held that this includes the exemption of interest on U. S. obligations from taxation by or under State or local authority. It has been pointed out to your committee, however, that one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income'

> upon which taxable net income is determined. The bill (sec. 105) makes it clear that the exemption for Federal obligations extends to every form of taxation that would require either the obligation, or the interest on it, or both to be considered directly or indirectly in the computation of the tax, *except nondiscriminatory franchise taxes* (or other nondiscriminatory nonproperty taxes imposed in lieu thereof) on corporations and except estate or inheritance taxes." (Emphasis supplied.)

The present statute adopts a comparable scheme, again preserving property, net income, and franchise taxes. We submit that Congress expressly intended to exempt these three types of taxes, even though gross receipts are used as a measure.

CONCLUSION.

For these reasons, the Court should find that state property, income and franchise taxes, even if measured by gross receipts, are not prohibited by section 1113 of the Federal Aviation Act.

Dated: Albany, New York
May 9, 1983.

Respectfully submitted,

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ADDENDUM.

New York Franchise Tax on Transportation and Transmission Companies.

The relevant provisions of section 184 of the New York State Tax Law, as amended by Chapter 486 of the New York Laws of 1981 provides as follows:

> "§ 184. Additional franchise tax on transportation and transmission corporations and associations.
>
> "1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owing or leasing property in this state in a corporate or organized capacity or maintaining an office in this state, shall pay a franchise tax which shall be equal

to three-quarters of one per centum upon its gross earnings from all sources within this state

* * *

4. Allocation of gross earnings from transportation and transmission services. —(a) Generally. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without the state during the period covered by the report or reports required by this chapter.

(b) Aviation corporations. An aviation corporation shall determine its gross earnings from transportation services within this state by multiplying its gross earnings from transportation services within and without this state by the arithmetical average of three ratios based on arrivals and departures, revenue tons handled and originating revenues during the period covered by the report or reports required by this chapter:

(i) the ratio which the aircraft arrivals and departures within this state by any such corporation during the preceding calendar year bear to the total aircraft arrivals and departures within and without this state during the same period, provided, however, arrivals and departures solely for

maintenance or repair, refueling (where no debarkation or embarkation of traffic occurs), arrivals and departures of ferry and personnel training flights or arrivals and departures in the event of emergency situations shall not be included in such arrival and departure ratio; provided, further, the state tax commission may also exempt from such ratio aircraft arrivals and departures of all non-revenue flights including flights involving the transportation of officers or employees receiving air transportation to perform maintenance or repair services or where such officers or employees are transported in conjunction with an emergency situation or the investigation of an air disaster (other than on a scheduled flight); provided, however, that arrivals and departures of flights transporting officers and employees receiving air transportation for purposes other than specified above (without regard to remuneration) shall be included in computing such arrival and departure ratio;

(ii) the ratio which the revenue tons handled by such corporation at airports within the state during the preceding calendar year bears to the total revenue tons handled by it at airports within and without this state during the same period; and

(iii) the ratio which such corporation's originating revenue within this state for the preceding calendar year bears to its total originating revenue within and without this state for the same period. As used in this section the term 'aircraft arrivals and departures' means the number of landings and takeoffs of the aircraft of an aviation corporation,

and the number of air pickups and deliveries by the aircraft of such corporation; the term 'originating revenue' means revenue to any such corporation from the transportation of revenue passengers and revenue property first received by such corporation either as originating or connecting traffic at airports and the term 'revenue tons handled' by any such corporation at an airport means the weight in tons, of revenue passengers (at two hundred pounds per passenger) and revenue cargo first received either as originating or connecting traffic or finally discharged by such corporation at such airport.

* * *

(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by rules and regulations promulgated by the tax commission.

(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without regard to the method of accounting employed by a corporation taxable hereunder."